

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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NORA KALLIEL,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN BOARD OF  
REGENTS, d/b/a UNIVERSITY OF MICHIGAN  
SCHOOL OF DENTISTRY,

Defendant-Appellee.

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UNPUBLISHED

December 11, 2001

No. 223948

Washtenaw Circuit Court

LC No. 98-017139-CM

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NORA KALLIEL,

Plaintiff-Appellant,

v

PETER YAMIN, DDS, and PAUL BYER, DDS,

Defendants-Appellees.

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No. 223949

Washtenaw Circuit Court

LC No. 98-004934-NH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this consolidated appeal, plaintiff appeals as of right the order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) and (10) in this dental malpractice case in which plaintiff filed an amended complaint against defendants alleging gross negligence resulting in the permanent dislocation of her temporomandibular joint.

Defendants moved for summary disposition on the grounds that governmental immunity barred suit against them and that plaintiff failed to establish a genuine issue of fact as to whether defendants Byer and Yamin were grossly negligent. Plaintiff argued that defendants were estopped from using the defense of governmental immunity because of representations of quality care in a patient's rights and responsibilities brochure published by defendants. Plaintiff also argued that, because defendants failed to establish that plaintiff's claims did not amount to gross negligence, summary disposition was improper. The trial court agreed with defendants and granted summary disposition on those grounds. We reverse.

We review orders granting summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. "When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). In reviewing a motion under MCR 2.116(C)(7), this Court accepts plaintiff's well-pleaded allegations as true and construes them in favor of the plaintiff. *Witherspoon v Guilford*, 203 Mich App 240, 243; 511 NW2d 720 (1994). If no facts are in dispute, the issue of whether plaintiff's claim is statutorily barred is a question of law. *Id.*

A government agency is immune from tort liability where the agency is performing a governmental function. MCL 691.1407(1). The Board of Regents of the University of Michigan is a governmental agency under MCL 691.1401(1)(c). A "governmental function" is "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(1)(f). The University of Michigan School of Dentistry and its dental clinic are authorized by statute. MCL 390.1 *et seq.* Therefore, its operation constitutes a governmental function.

Likewise, government employees are also immune from tort liability so long as they are acting within the scope of their authority, their government agency is performing a governmental function, and their conduct does not amount to "gross negligence." MCL 691.1407(2). It is undisputed that defendants Byer and Yamin were acting within the scope of their authority in treating plaintiff. Likewise, as noted above, the University of Michigan's operation of the dental clinic is a governmental function. Thus, the only issue is whether the conduct of defendants Yamin and Byer amounted to "gross negligence."

Plaintiff contends that governmental immunity is an affirmative defense for which defendants must plead supporting facts, and cites *Patterson v Kleiman*, 199 Mich App 191, 192; 500 NW2d 761 (1993) for that proposition. *Patterson* is factually distinct from the present case. In *Patterson*, the plaintiff alleged ordinary negligence in support of a medical malpractice claim. *Id.* The plaintiff never alleged gross negligence, and this Court found that, because the plaintiff was not required to anticipate an affirmative defense, the plaintiff had no duty to allege gross negligence. *Id.*

Unlike the plaintiff in *Patterson*, plaintiff did amend her complaint to allege gross negligence against defendants. Having alleged gross negligence, plaintiff is required to set forth facts showing gross negligence in order to survive summary disposition pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999); *Jackson v Saginaw Co*, 458 Mich 141, 150-151; 580 NW2d 870 (1998). Thus, *Patterson* is not dispositive. Accordingly, the trial court correctly concluded that plaintiff had the burden of establishing that a genuine issue of material fact existed as to whether defendants' conduct amounted to gross negligence.

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Here, plaintiff alleged that defendants were grossly negligent for requiring plaintiff to wait seven months between the time of her root canal and the time she received permanent crowns, resulting in the "shifting of the

occlusion and the need for newly fitted crowns.” Plaintiff also alleged that defendant Byer forced a crown onto a tooth that he knew did not fit the tooth. She alleged that the excessive pressure and force used, as well as the grinding down of the crown for 2-1/2 hours, either caused or contributed to the displacement of plaintiff’s temporomandibular joints and resulted in the crowding and uneven spacing of plaintiff’s remaining teeth. She also alleged that defendants failed to attach dental significance to plaintiff’s complaints of joint pain, discomfort and dysfunction following the crown placement procedure and failed to advise plaintiff that she suffered from a temporomandibular joint condition that required immediate treatment in order to avoid permanent injury. Plaintiff also filed an affidavit of merit that set forth the applicable standard of care, how defendants’ conduct breached that standard, and how this breach caused the permanent dislocation of plaintiff’s temporomandibular joints. Keeping in mind that we must give the benefit of any doubt to the nonmoving party and must be liberal in finding a genuine issue of fact, *Zine v Chrysler*, 236 Mich App 261, 270; 600 NW2d 384 (1999), we conclude that plaintiff presented sufficient evidence to establish a genuine issue of material fact as to whether defendants’ conduct was “so reckless as to demonstrate a substantial lack of concern for whether an injury results.” Therefore, the trial court incorrectly dismissed plaintiff’s complaint pursuant to MCR 2.116(C)(10).

As an alternative ground for reversal, plaintiff contends summary disposition should have been denied because defendants waived or are estopped from claiming immunity by virtue of their having published a patient’s rights and responsibilities brochure promising potential patients adequate and appropriate care. Regardless of whether such a common-law exception to governmental immunity exists, plaintiff has failed to establish detrimental reliance, an essential element required for the doctrine of equitable estoppel to apply. Plaintiff presented no evidence that she received defendants’ patient’s rights brochure, that she read it, or that she acted in reliance on the promises of quality care in the brochure when she submitted herself to treatment at the dental clinic. Thus, regardless of whether the doctrine of equitable estoppel may bar governmental immunity under certain circumstances, plaintiff has failed to establish all the elements necessary for equitable estoppel to arise. *Conagra, Inc v Farmers Bank*, 237 Mich App 109, 141; 602 NW2d 390 (1999).

Reversed.

/s/ E. Thomas Fitzgerald  
/s/ Jane E. Markey